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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 532

HUDSON-SHARP MACHINE CO.,
a Wisconsin corporation,
Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
a Massachusetts corporation,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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ERVING PAPER MILLS,
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Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of said Court of Appeals entered in the above entitled case on June 3, 1964.

OPINIONS BELOW

The original decision and the decision after trial on motion for a new trial and other relief, written by the Honorable K. P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin, are reported in 223 F. Supp. commencing at pages 913

and 926, respectively. Therein are set forth the Court's Findings of Fact and Conclusions of Law in accordance with the requirements of Rule 52 of the Federal Rules of Civil Procedure, 28 USC. The two opinions of the District Judge also appear at pages 3-24 and 28-32 in the plaintiff's Appendix in the Court of Appeals, certified and filed in this Court as a part of the transcript of the record. Hereinafter reference to it will be (Tr. p. .....).

The opinion of the United States Court of Appeals for the Seventh Circuit reversing Judge Grubb is reported in 332 F. 2d commencing at page 674, and a copy is also set forth in Appendix I to this Petition.

JURISDICTION

This is a "diversity" jurisdiction case and the jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1) and Section 2101(c).

Motions for rehearing and for rehearing by the Seventh Circuit Court of Appeals *en banc* were timely filed and each was denied without opinion on July 1, 1964. The time for the filing of this Petiton for writ of certiorari therefore expires September 29, 1964. See *Department of Banking, State of Nebraska v. Pink* (N.Y., 1942), 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254, rehearing denied 318 U.S. 801, 63 S. Ct. 850, 87 L. Ed. 1166.

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 34 of the Judiciary Act of 1789, as revised (28 U.S.C. 1652) as construed by this Court in *Erie vs. Tompkins,* 304 U.S. 64, empower a Court of Appeals

in a "diversity" jurisdiction case to adopt its own rule as to the burden of proof and, on this basis, reverse a judgment of a Wisconsin District Judge entered in accordance with the rule as to the burden of proof (a) established by the Wisconsin Supreme Court with respect to Section 121.04 of the Wisconsin Statutes (the Uniform Sales Act); and (b) as prescribed by the Wisconsin Legislature for the construction of said uniform statute?

2. If the United States Court of Appeals for the Seventh Circuit is empowered to ignore the Wisconsin law as a rule of decision and adopt a "rule of fairness" as to the burden of proof, was it due process for it then to order judgment forthwith against the defendant-petitioner without giving it an opportunity to adduce evidence to meet the burden which was thrust upon it by said newly enunciated "rule of fairness"?

STATUTES INVOLVED

Wisconsin Statute to be construed, the particular portion involved being italicized:

Section 121.04

"(1) A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"(2) The provisions of this section apply to every such contract or sale, notwithstanding that the

goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; *but if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.*" (Italics supplied)

Wisconsin statutory rule of construction of the foregoing statute:

"121.74 INTERPRETATION SHALL GIVE EFFECT TO PURPOSE OF UNIFORMITY. This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it."

Section 34 of the Judiciary Act of 1789, as revised, 28 USC 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED FOR REVIEW

Plaintiff-buyer, after an exchange of samples (none of which were satisfactory to it), issued its Purchase Order No. 11198 under date of August 20, 1956 for the purchase from defendant-seller of two Campbell Wrapper machines " • • • to efficiently polyethylene wrap ¼ fold, 13½" luncheon napkins, both 160 ct. & 250 ct. package sizes as samples to be submitted" by

defendant-seller and to be "approved by" plaintiff-buyer. The order specified, however, that the manufacture of the second machine was to be held up until the first machine was in satisfactory operation and a decision was reached as to what "product" was then to be wrapped on said second machine. Said purchase order concluded: "This confirms order given to Mr. Cletus Wetli on this day and is subject to details covered in the discussion of the above equipment." (Appendix I, pp. 18-19)

After further negotiations, changes were made in the wrapping machine specifications and the price reduced from $13,500 to $11,000 per machine. A new Purchase Order No. 11319 was issued, *identical* with the first purchase order except as to (i) the number, (ii) immaterial grammatical corrections, and (iii) the reduction in the purchase price. (Appendix I, pp. 18-19)

On August 27, 1956 the second purchase order, No. 11319, was accepted by defendant-seller but this purchase order like the first one, was subject to (1) the submission of and approval of samples by way of identifying the packages the machine was to produce and (2) to details covered in the discussion prior to issuance of the purchase order. The defendant-seller did not submit samples for approval, but the trial Court determined that plaintiff-buyer had waived this condition.

On October 19, 1956 defendant-seller advised the plaintiff-buyer that it was unable to design a wrapping machine which would package napkins in the manner specified by plaintiff-buyer. (Appendix I, pp. 19-20)

In January 1959 plaintiff-buyer sued to recover $300,000 for breach of the alleged contract of sale of the two $11,000 machines. (Tr. p. 1)

By amendment to its Answer, consented to in writing by the plaintiff-buyer, the defendant-seller set up as a third defense that "The contract does not comply with the provisions of Section 121.04 of the Wisconsin Statutes." (Tr. p. 1)

In 1958, in *Padgham v. Wilson Music Co.*, 3 Wis. 2d 363, at pages 369-370, 88 N.W. 2d 679, at p. 683, the Wisconsin Supreme Court stated:

> "Our sec. 121.04, Stats., provides that a parol contract for the sale of goods *'shall not be enforceable.'* In *Holtan v. Bjornson*, supra (p. 519), we declared that the words *'shall not be enforceable'* are the equivalent of *'shall be void.'* This being so, if a party proves by parol testimony a contract falling within the statute of frauds, he has not met the burden of proof because such testimony merely establishes a void contract."

In 1931, in construing the interpretive directions of the Uniform Conditional Sales Act, corresponding to Section 121.74 of the Wisconsin Statutes (Uniform Sales Act), set forth above under Statutes Involved, the Wisconsin Supreme Court stated:

> "As before stated in this opinion, sec. 122.30 impels us to follow the decisions of other courts in construing uniform acts, to the end that uniformity may result. Under uniform acts uniformity of construction by the courts is greatly to be desired." *Forgan v. Smedal*, 203 Wis. 564, at 575, 234 N.W. 896, 900.

In 1943, with respect to the construction of the Uniform Sales Act of the State of Illinois, the United States Court of Appeals for the Seventh Circuit Stated:

> "This Act has been adopted by many states of the Union in order that there may be uniformity of the laws on this subject within the boundaries of the

states adopting it. In the interpretation of similar uniform laws, the decisions of other jurisdictions on such points as have not been decided by the courts of the forum *are not merely persuasive, but are as binding as would be a decision of the highest court of the forum." In re Halferty,* 136 F. 2d 640, p. 643 (CA 7, 1943). (Italics supplied)

Judge Grubb's Findings in his original opinion material to the first question presented here, were as follows:

"In the present case, though undoubtedly the machines were to be manufactured by the defendant especially for the plaintiff, the plaintiff has failed to carry its burden. The evidence does not establish that after manufacture the machines would not have been suitable for sale in the ordinary course of seller's business. It is the court's conclusion that the contract is, therefore, within and subject to the requirements of the statute of frauds." (223 F. Supp. 913, at page 923; Tr. p. 18)

and

"Therefore, it is the court's conclusion that the memorandum here failed to satisfy the statute of frauds. Thus, the contract is void under the statute." (223 F. Supp. 916, at page 925; Tr. p. 23)

Judge Grubb confirmed his original Findings in his decision upon plaintiff-buyer's motion for new trial and other relief as follows:

"Plaintiff would also have this court change the law as to burden of proof. The argument posed is unique and has some logic, *but this court is obliged to apply the Wisconsin law as it presently exists.*

* * * The issue is: If Hudson-Sharp Machine Co. had been able to build a practical machine, would it then have been marketable? On this issue, plaintiff has failed to meet its burden. *In its decision, this court found that 'The record is not at*

all clear that such would not have been resalable in the ordinary course of trade'. Plaintiff has cited nothing which refutes this finding". (223 F. Supp. 916, at page 927; Tr. p. 31). (Italics supplied).

REASONS FOR GRANTING THE WRIT

I

The law of Wisconsin constitutes the rule of decision in this diversity case. Thus Mr. Justice Brandeis stated that the Federal Court was to apply state law whether "declared by its Legislature in a statute or by its highest court." *Erie Railroad Co. v. Tompkins* (1938), 304 U.S. 64, 78, 82 L. Ed. 1188, 1194, 58 S. Ct. 817, 822. Subsequently Mr. Justice Stone in *West v. American Telephone & Telegraph Co.* (1940), 311 U.S. 223, 237, 85 L. Ed. 139, 144, 61 S. Ct. 179, 183, stated:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In the instant case the Court of Appeals expressly held:

> "Upon which party the burden of proof rests has been held to be a matter of substantive law and governed by local law in diversity cases. *Palmer v. Hoffman,* 318 U.S. 109, 117 (1943)." (*Erving Paper Mills v. Hudson-Sharp Machine Co.,* 332 F. 2d 674, at page 677; Appendix I, p. 21)

As noted above in the Statement of Facts, the Wisconsin Supreme Court has held that a contract for the sale of goods within Section 121.04 of the Wisconsin

Statutes, but which does not comply with the requirements of that statute is not merely unenforceable, but is void, and that plaintiff does not meet his burden of proof if the record discloses that the contract sued upon falls within the statute of frauds but there was no compliance therewith. *Padgham v. Wilson Music Co.*, 3 Wis. 2d 363, at pages 369-70, 88 N.W. 2d 679, at page 683.

It is also pertinent and persuasive, though perhaps not controlling, that Professor Williston, drafter of the Uniform Sales Act, in his work *Williston on Sales,* Revised Edition, in Section 55(b) Vol. I at page 150 states:

> "The burden of proof to establish the necessary facts is on one who seeks to enforce an oral contract to sell goods on the ground of the exception."

The Court of Appeals apparently did not consider this Wisconsin decision as specifically dealing with the burden of proof under the last clause of Section 121.04(2) of the Wisconsin Statutes, since it stated:

> *"Erving concedes that the general rule in Wisconsin is that the burden of proof of compliance with the statute of frauds is on the party claiming the contract to be valid.* However, Erving contends that the burden of proving whether the specially manufactured goods were salable in the ordinary course of the manufacturer's business should constitute an exception to this general rule and that this burden should be on the manufacturer.
>
> We are unaware of any Wisconsin case which has passed upon this question and, therefore, we must look to the underlying policies involved and the law in other jurisdictions in an attempt to determine how Wisconsin courts would decide this issue." (Italics Supplied) *Erving Paper Mills v. Hudson-Sharp Machine Co.*, 332 F. 2d 674, at page 677; Appendix I, p. 22)

In considering how the Wisconsin courts would decide the specific issue as to the burden of proof under the last clause of Section 121.04(2), the basic and controlling rule of statutory construction enunciated by the Wisconsin Supreme Court was ignored.

The Wisconsin Supreme Court considers that Section 121.74 of the Wisconsin Statutes requires it to interpret and construe the Uniform Sales Act as adopted by Wisconsin so as to effectuate its general purpose to make uniform the laws of those states which enact it, i.e., it is required to follow the decisions of other states on issues before it if it has not previously construed the uniform statute in question.

Thus in *Forgan v. Smedal* (1931), 203 Wis. 564, at page 575, 234 N.W. 896, page 900 the Wisconsin Supreme Court held that provisions in the Uniform Conditional Sales Act adopted by Wisconsin, corresponding to said Section 121.74, "impels us to follow the decisions of other courts in construing uniform acts, to the end that uniformity may result."

It is important to note that Wisconsin has adopted 35 uniform laws, each of which contains provisions corresponding to Section 121.74 of the Wisconsin Statutes or of similar import, all of which are set forth in Appendix II of this Petition. Manifestly these legislative directions as to statutory construction are declaratory of the Wisconsin policy and are controlling in determining who has the burden of proof in the instant case. And in construing the Uniform Sales Act of Illinois the United States Court of Appeals for the Seventh Circuit had previously held as follows:

> "This Act has been adopted by many states of the Union in order that there may be uniformity of the

> laws on this subject within the boundaries of the states adopting it. In the interpretation of similar uniform laws, the decisions of other jurisdictions on such points as have not been decided by the courts of the forum *are not merely persuasive, but are as binding as would be a decision of the highest court of the forum.*" *In re Halferty,* 136 F. 2d 640, p. 643 (CA 7, 1943) (Italics supplied)

The only courts which have squarely passed upon the issue as to the burden of proof under the last clause of Section 121.04(2) of the Wisconsin Statutes are those in the State of New York, all of which sustain Judge Grubb's finding as to the Wisconsin law on this subject.

In *Zimmerman v. Gillman, et al,* (1918), 172 N.Y.S. 263, the Supreme Court of New York at page 263 held:

> *"That the suits of clothes were to be manufactured by the seller especially for the buyer is clear.* Although selected by plaintiff, they were of material readily procurable in the general market and of quite normal and usual styles and sizes. Defendants were manufacturers of men's clothing, and *plaintiff failed to show that these goods were not suitable for sale to others in the ordinary course of defendants' ('the seller's') business."* (Italics supplied)

See also to the same effect *Reading Silk Mills v. Barso* (1918), 169 N.Y.S. 672, at page 673 and *Greenbaum v. Stracher,* et al (1920), 181 N.Y.S. 738, at p. 739.

Finally, in 1925 the highest court in New York passed upon this issue. *In Berman Stores Co., Inc. v. Hirsh,* et al (1925), 148 N.E. 212, 240 N.Y. 209. As here, a plaintiff buyer sued to recover damages for the failure of the defendants to manufacture and deliver goods, men's suits of various sizes and models. The defendants pleaded as a defense the Statute of Frauds and *at the close of the*

plaintiff's case the complaint was dismissed on the ground that the plaintiff had failed to show that the proffered written memorandum complied with the Statute of Frauds. With respect to the burden of proof the court at page 213 said:

> *"In the present case, though undoubtedly the goods were to be manufactured by the seller especially for the buyer, the evidence does not establish that after manufacture they would not be suitable for sale in the ordinary course of the seller's business.* The seller's business is to manufacture and sell goods of similar character. * * * The somewhat unsatisfactory evidence that the defendants agreed to place upon the goods plaintiff's labels and lot numbers is insufficient to show that the goods could not be sold to others. For these reasons, *the plaintiff has failed to show that the alleged contract comes within the exception of the statute of frauds.* The question remains whether the statute has been complied with." (Italics supplied)

In the instant case the Court of Appeals referred only to the decision of an intermediate Indiana court in *Eddleman v. Myers* (1934), 98 Ind. App. 394, 188 N.E. 802. In the *Eddleman* case the plaintiff-seller sued on an oral contract of sale for the purchase price of some cherry trees and logs sawed into lumber and delivered to the defendant, at an agreed price of $50 per thousand feet. The buyer acknowledged that he had agreed to buy 3500 feet of select clear cherry lumber but alleged that the lumber delivered was not of this type and refused to pay for it. The *buyer apparently did not plead the Statute of Frauds.* The Indiana court noted at page 802:

> "Evidence was introduced by the appellee (plaintiff-seller) from which the jury could and did find for the appellee and returned a verdict of $300."

On appeal, the buyer asserted that the agreement was controlled by the Uniform Sales Act, but the appellate court rejected the contention because "there is no evidence that such goods are suitable for sale to others in the ordinary course of the seller's business." See p. 802.

It will be noted:

1. That the issue of the statute of frauds was not raised in the *Eddleman* case until after the jury verdict for plaintiff, whereas here the plaintiff buyer was apprised prior to the trial of the necessity of proving up a valid contract within the statute of frauds or that its contract was not subject to the statute of frauds.

2. If the rule of the *Eddleman* case is that there must be some evidence that the goods in question were suitable for sale to others in the ordinary course of the seller's business in order to cast the burden of going forward upon the plaintiff, this prerequisite was met in this case. There was express testimony that the wrapping machines ordered by the plaintiff-buyer were suitable for sale to others by the defendant-seller in the ordinary course of its business and that there was a market for this class of equipment. (Tr. pp. 17 and 96) As set forth in the Statement of Facts, the trial judge expressly found "The record is not at all clear that such would not have been resalable in the ordinary course of trade", and with respect to this finding in his original decision the trial judge commented in his decision on motion for new trial and other relief: "Plaintiff has cited nothing which refutes this finding." (Tr. p. 31)

It is manifest that the decision in *Eddleman v. Myers*, 98 Ind. App. 394, 188 N.E. 802, in no wise militates against the trial judge's finding as to the Wisconsin Law. If presented specifically with the issue as to who has the

burden of proving the facts necessary to exclude an oral agreement from the provisions of Section 121.04 of the Wisconsin Statutes, when that defense is timely raised, the Wisconsin Supreme Court clearly would, as did Judge Grubb, have adopted the rule established by the New York Courts.

The Court of appeals erred in reversing Judge Grubb because of its view as to a "rule of fairness" in lieu of following the jurisdictional rule of decision specified by the Congress in Section 34 of the Judiciary Act of 1789 as construed by this court in *Erie v. Tompkins,* 304 U.S. 64. See 28 USC 1652.

II

The Uniform Sales Act, as adopted by Wisconsin, excepts from the Statute of Frauds a contract for the sale of goods especially manufactured by the seller for the buyer if the goods are not *"suitable* for sale to others in the ordinary course of the seller's business" (Italics supplied) The burden placed upon the defendant-seller by the Court of Appeals was that of proving the "unsalability" of the goods in question, not their "suitability for sale". Under no circumstances could defendant-seller have anticipated before trial that it had to meet such a burden, i.e., call customers to testify they would have purchased the Campbell wrappers as ordered by defendant-buyer.

When the Court of Appeals adopted what it called a "rule of fairness" and shifted the burden of proof from the plaintiff-buyer to the defendant-seller, in fairness it should have afforded the latter an opportunity to meet the newly imposed burden. The situation is analogous to that in *Byrd vs. Blue Ridge Rural Electric Co-op.,*

Inc., 356 U.S. 525, at p. 532, 2 L. Ed. (2d) 953 at page 959, and 78 Sup. Ct. 893 at p. 899 (1958) wherein this court commented:

> "At all events the petitioner is plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation."

CONCLUSION

In view of the foregoing it is respectfully requested that a writ certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit to review its decision entered June 3, 1964 reversing a judgment in this case of the United States District Court for the Eastern District of Wisconsin in contravention of Section 34 of the Judiciary Act of 1789 as construed by this court and with the effect of denying due process to defendant-petitioner.

Respectfully submitted,

MAXWELL H. HERRIOTT,
Attorney for Defendant-Petitioner.

Dated: September 23, 1964.

APPENDIX I

In the

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14530 SEPTEMBER TERM, 1963—APRIL SESSION, 1964

ERVING PAPER MILLS, a Massachusetts corporation,
Plaintiff-Appellant,
v.
HUDSON-SHARP MACHINE CO., a Wisconsin corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

June 3, 1964

Before HASTINGS, *Chief Judge,* and DUFFY and SCHNACKENBERG, *Circuit Judges.*

HASTINGS, *Chief Judge.* Plaintiff Erving Paper Mills (Erving), a Massachusetts corporation, brought this diversity action against defendant Hudson-Sharp Machine Co. (Hudson-Sharp), a Wisconsin corporation, seeking $300,000 in damages for breach of contract.

The district court entered judgment dismissing the action, with costs to Hudson-Sharp, due to failure of the contract to comply with the statute of frauds. The district court's opinion is reported at 223 F. Supp. 913 (1963). Erving appealed.

Erving operates a paper mill and manufactures and sells paper napkins. Prior to 1956, Erving generally marketed napkins in cardboard packages. About 1956, Erving began marketing its product in re-usable polyethylene bags. The napkins were placed in these bags and sealed by hand.

By July, 1956, the demand for these napkins in re-usable bags had increased to the point where Erving was interested in investigating the use of machines for packaging.

In July, 1956, Erving was contacted by Cletus Wetli, vice-president of Hudson-Sharp. Hudson-Sharp was engaged in designing, manufacturing and selling various types of machinery, including a wrapping machine known as the Campbell Wrapper.

Wetli familiarized himself with Erving's packaging needs and on July 17, 1956 wrote Erving, in pertinent part, as follows:

> "Under separate cover I am sending you two packages of napkins wrapped in polyethylene in a manner that we can accomplish on a standard Campbell wrapper.
>
> "This machine will operate at any speed between 20 and 60 packages per minute. The machine is illustrated on the enclosed photograph #832.
>
> "The price of the machine, complete, f.o.b. Green Bay, Wisconsin is $13,150.00.
>
> "These sample packages are not just as tightly wrapped as I wanted them but you understand that we can make it tighter on the machine.
>
> "After you have received these samples, I would appreciate your comments."

Following this letter, there were numerous communications and negotiations between Erving and Hudson-

Sharp and on August 20, 1956 Erving placed a purchase order with Wetli for two Campbell Wrappers. Wetli transmitted the order to Hudson-Sharp with the following memorandum, in part:

> "Attached is a purchase order for 2 machines at $13,150.00 each, P. O. #11198.
>
> "The purchase order is explanatory in itself so I am not going to go into further details at this time except to caution that the package must be very tight with a short end as possible. You have received samples of their requirements and before proceeding with the machine actually, I would rewrap these samples and return them to Erving for them to give us a definite confirmation as to their satisfaction.
>
> "As discussed with Mr. Campbell over the phone, we are sure that we can sufficiently compress these napkins in polyethylene and make the longitudinal seal, then using a short crimp on the ends, the bulk of the napkins would come back and produce a sufficiently tight package."

As a result of negotiations two or three days after August 20, 1956, the purchase price was reduced to $11,000 per machine and a new purchase order was written. This purchase order was identical to the first except for reduction in price and immaterial grammatical corrections. It stated:

> "Model #2W10 Campbell Wrappers
>
> "Each wrapper to efficiently polyethylene wrap ¼ fold, 13½"; luncheon napkins, both 150 ct. & 250 ct. package sizes as samples to be submitted by Hudson Sharp and to be approved by Erving Paper Mills.
>
> "Each wrapper to be equipped with change parts required for both size packages.
>
> "Wrapped packages will be such that package can be held in one hand at the end in a horizontal position and the package will remain a rigid block.

"This machine is to wrap at the rate of 40 packages per minute and is to be equipped with infeed and delivery conveyors to handle this production.

"IMPORTANT: It is agreed that the manufacture of the second machine is to be held up until the first machine is in satisfactory operation at Erving Paper Mills and a decision is reached as to what product is then to be wrapped on this second machine.

"Delivery is to be within 60 days of receipt of this order.

"This confirms order given to Mr. Cletus Wetli on this day and is subject to details covered in the discussion of the above equipment.

$11,000.00 per machine

ERVING PAPER MILLS,
By [Signature of Meyer Hyman,
Treasurer of Erving]"

On August 29, 1956, Erving received a letter from Hudson-Sharp which said, *inter alia:*

"We have for acknowledgment your P.O. #11319 dated August 20, 1956, covering two No. 2W10 Campbell Wrappers especially constructed for wrapping 160 and 250 count luncheon napkins in polyethylene, per samples submitted.

"It is understood that these machines will be constructed on the basis as set out in your order, with one machine to be manufactured and installed first before building the second machine.

"Thank you very much for the order, and we have entered these in our production schedule accordingly."

On October 19, 1956, Erving received from Hudson-Sharp the following letter, in part:

"We are very sorry to have to inform you that our Engineering Department has not been able to design

a machine that we feel will do the job you want. We have done considerable conception design thinking and have given due consideration to Mr. Durna's suggestion for using a Doughboy Sealer to seal one end. There seems to be so many problems involved, however, that we do not feel a practical design will result.

"We regret very much, therefore, that we cannot firm your order and have no choice but to request cancellation. We sincerely hope that you have not been inconvenienced and would appreciate your confirming this letter.

"We may do additional development work on a package of this type; if we feel that we have solved our major problems, we will again get in touch with you promptly."

This letter was the first indication to Erving that Hudson-Sharp intended to cancel the order. Erving answered with a letter which said, in substance, that Erving had completed conversion plans in anticipation of the machines and could not accept cancellation.

Further negotiations failed and Erving brought this action for breach of contract. By stipulation of the parties, the issue of damages was severed from that of liability and this appeal is concerned only with the latter.

Hudson-Sharp, in its answer to Erving's complaint, asserted that it had not accepted Erving's order; that Erving's offer was subject to a condition precedent which did not occur; and the contract did not satisfy the Wisconsin statute of frauds.

The district court held in favor of Erving on the first two defenses and for Hudson-Sharp on the third.

While Hudson-Sharp did not file a cross-appeal challenging the district court's holdings that the acknowledg-

ment received by Erving on August 29, 1956, *supra,* constituted an acceptance, and that the asserted condition precedent was satisfied or waived, we express our agreement with these holdings and adopt them as part of this opinion. 223 F. Supp. at 916-920.

The issue before us is whether the contract came within the Wisconsin statute of frauds and, if so, whether there was compliance with the statute.

We are concerned with Section 121.04 of the Wisconsin Statutes (1955) which provides in part as follows:

> "121.04 Statute of frauds. (1) A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.
>
> "(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; *but if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.*" (Emphasis added.)

Upon which party the burden of proof rests has been held to be a matter of substantive law and governed by local law in diversity cases. *Palmer v. Hoffman,* 318 U. S. 109, 117 (1943).

The district court held, 223 F. Supp. at 921, that under Wisconsin law, *Libman v. Fox Pioneer Scrap Iron Co.*, 175 Wis. 485, 185 N.W. 551 (1921); *Bacon v. Eccles, Jr.*, 43 Wis. 227 (1877), Erving had the burden of proving that the statute of frauds had been complied with or of showing facts which would take the case out of the statute and that Erving had not sustained this burden.

Erving concedes that the general rule in Wisconsin is that the burden of proof of compliance with the statute of frauds is on the party claiming the contract to be valid. However, Erving contends that the burden of proving whether the specially manufactured goods were salable in the ordinary course of the manufacturer's business should constitute an exception to this general rule and that this burden should be on the manufacturer.

We are unaware of any Wisconsin case which has passed upon this question and, therefore, we must look to the underlying policies involved and the law in other jurisdictions in an attempt to determine how Wisconsin courts would decide this issue.

The machine contracted for in the instant case was never built. Arthur Olson, general manager at Hudson-Sharp for food machinery, testified concerning the reasons for not constructing the machine. He stated:

> "I made the final decision not to go ahead with the Campbell wrapping machines for Erving. As to what led to my decision, one of the first problems that confronted me when I came to Hudson-Sharp was that we had approximately $140,000 worth of Campbell wrappers which were either on their way back to us or had already been shipped back to us as unacceptable by about ten different customers. As to other reasons which led to the decision not to go ahead, we were concerned about the fact that the

machine would not do the job, generally that Erving wanted done."

On cross-examination, Olson testified that the reason the machine was not built was because construction would be "very difficult."

We feel that it is placing an unfair and unrealistic burden on Erving to require it to prove the unsalability of this machine. Erving does not manufacture and sell machines of this type and the particular machine in issue has not been built due to difficulties encountered in construction. Further, we cannot understand how a customer can be charged with the burden of proving the unsalability of a product the supplier is unable to produce.

IX Wigmore, Evidence § 2486, at 275 (3d ed. 1940), in concluding a discussion of various rules used to determine which party has the burden of proof states, "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations."

One policy consideration discussed by Wigmore and applied in certain cases, which we feel applicable to the present case, is that "the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false." *Ibid.*

Hudson-Sharp was in the business of manufacturing and selling wrapping machines. It would have peculiar knowledge, unavailable to Erving, of whether, in the language of the statute, the machine was "not suitable for sale to others in the ordinary course of the seller's [Hudson-Sharp] business."

We hold, under the circumstances of this case, a rule of fairness places the burden of proving the salability of

a machine which the manufacturer deems too difficult to manufacture, on the manufacturer. See *Eddleman v. Myers*, 98 Ind. App. 394, 188 N.E. 802 (1934).

We must determine whether Hudson-Sharp sustained this burden.

Hudson-Sharp manufactured standard size Campbell wrapping machines. The district court stated:

> "It is obvious that * * * [Hudson-Sharp] did not have a machine which would accomplish * * * [Erving's] needs. Thus, it fully intended to take an existing machine, use it as a base, and build it into a machine to perform * * * [Erving's] specialized requirements. The desired machine was not then a standard item which Hudson-Sharp kept in stock. The machine that did exist was ill-suited for the job. * * * [Hudson-Sharp] was to take the machine it did have, consisting of a frame, motor, differential, and certain other parts, and build it into a unit which would perform * * * [Erving's] own needs." 223 F. Supp. at 922.

If merely slight alterations in a machine make it suitable for sale to others, the statute of frauds has been held applicable. *Clinton Mills Co. v. Saco-Lowell Shops*, 1 Cir., 3 F. 2d 410 (1925). If substantial changes in a manufacturer's standard machine are required, cases have held that the statute of frauds is inapplicable. *Ericsson Mfg. Co. v. Caille Bros. Co.*, 195 Mich. 545, 162 N.W. 81 (1917).

In the instant case the district court found:

> "* * * There is little in the record to indicate that a substantial overhaul would have been necessary to make the machines marketable beyond what might possibly be inferred from the nature of their special construction. Likewise, there is absolutely nothing to indicate that only a 'routine' adjustment would have been necessary as alleged by * * * [Hudson-Sharp's] counsel." 223 F. Supp. at 923.

> " * * * If the burden were on the defendant, the court would find that the defendant has not met that burden * * *." *Id.* at 926.

This finding is supported by substantial evidence. We adopt the portion of the district court's opinion which sets out this evidence. 223 F. Supp. at 922, 923.

In view of our holding, *supra,* and this finding, we conclude that Hudson-Sharp failed to sustain its burden of proving the machine to be suitable for sale to others in the ordinary course of its business and that the Wisconsin statute of frauds does not apply to this sale.

It necessarily follows that we do not reach the question of whether the writings between the parties constituted a memorandum of the contract sufficient to satisfy the statute of frauds.

The judgment below is reversed and the case is remanded to the district court with instructions to enter judgment for Erving on the question of liability.

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II

INTERPRETATIVE STATUTORY DIRECTIONS IN UNIFORM LAW ADOPTED BY WISCONSIN LEGISLATURE

(Uniform Sales Act) 121.74 INTERPRETATION SHALL GIVE EFFECT TO PURPOSE OF UNIFORMITY. This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it.

(Uniform Fiduciaries Act) 112.01(14) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Act for Simplification of Fiduciary Security Transfers) 112.06(10) UNIFORMITY OF INTERPRETATION. This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Joint Obligations Act) 113.08. INTERPRETATION. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Warehouse Receipts Act) 119.61 CONSTRUCTION. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Bills of Lading Act) 120.52 INTERPRETATION OF CHAPTER. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Conditional Sales Act) 122.30 UNIFORMITY OF INTERPRETATION. This chapter shall be so interpreted and construed as to effectuate its

general purpose to make uniform the law of those states which enact it.

(Uniform Partnership Act) 123.02(4) This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(Uniform Limited Partnership Act) 124.28(2) This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings) 128.25(9) UNIFORMITY OF INTERPRETATION. This section shall be so construed as to make uniform the law of those states which enact it.

(Uniform Narcotic Drug Act) 161.23 INTERPRETATION. This chapter shall be so interpreted and construed as to make uniform the laws of those states which enact it.

(Uniform Machine Gun Act) 164.11 UNIFORMITY OF INTERPRETATION. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Stock Transfer Act) 183.18 UNIFORMITY OF CONSTRUCTION. The provisions of this chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Bank Collection Code) 220.15(16) INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Common Trust Fund Act) 223.055(4) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effec-

tuate its general purpose to make uniform the law of those states which enact it.

(Uniform Principal and Income Act) 231.40(9) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Acknowledgment Act) 235.19(14) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted as to make uniform the laws of those states which enact it.

(Uniform Vendor and Purchaser Risk Act) 235.72 (2) UNIFORMITY OF INTERPRETATION. This section shall be so construed as to make uniform the law of those states which enact it.

(Uniform Simultaneous Death Act) 237.10(7) This section shall be so construed as to make uniform the law in those states which enact it.

(Uniform Trust Receipts Act) 241.48 UNIFORMITY OF INTERPRETATION. Sections 241.31 to 241.50 shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

(Uniform Fraudulent Conveyance Act) 242.12 INTERPRETATION OF CHAPTER. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Divorce Recognition Act) 247.22(3) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Absence as Evidence of Death and Absentee's Property Act) 268.32 UNIFORMITY OF INTERPRETATION. Sections 268.22 to 268.34 shall be so construed as to make uniform the law of those states which enact it.

(Uniform Declaratory Judgments Act) 269.56(15) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(Uniform Enforcement of Foreign Judgments Act) 270.96(17) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Probate of Foreign Wills) 310.07(9) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate it general purpose to make uniform the law of those states which enact it.

(Uniform Veterans' Guardianship Act) 319.33(18) LIBERAL CONSTRUCTION. This section shall be so construed to make uniform the law of those states which enact it.

(Wisconsin Uniform Gifts to Minors Act) 319.69(1) Sections 319.61 to 319.71 shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Securities Ownership by Minors Act) 319.75(4) CONSTRUCTION. This section shall be so construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

(5) INTERPRETATION. This section shall supersede any provision of law in conflict therewith.

(Uniform Ancillary Administration of Estates Act) 324.31 (14) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Uniform Extradition of Prisoners as Witnesses) 325.32(9) UNIFORMITY OF INTERPRETATION. This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Uniform Extraditions of Witnesses in Criminal Actions) 325.33 (5) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted as to make uniform the law of the states which enact it.

(Uniform Photographic Copies of Business and Public Records as Evidence Act) 327.29(2) This section shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.

(Uniform Judicial Notice of Foreign Law Act) 328.01(6) INTERPRETATION. This section shall be so interpreted as to make uniform the law of those states which enact it.

(Uniform Criminal Extradition Act) 964.29 INTERPRETATION. This chapter shall be so interpreted as to make uniform the law of those states which enact it.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 532

HUDSON-SHARP MACHINE CO.,
A WISCONSIN CORPORATION,
Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
A MASSACHUSETTS CORPORATION,
Plaintiff-Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

REPLY TO PETITIONER'S FIRST POINT.

The Court of Appeals ruling that petitioner had the burden of proof to establish that the machines it had contracted to design and build (but had never built because of claimed inability to design a practical machine), would have been "suitable for sale to others in the ordinary course of its business," is not in conflict with either: (a) any prior decision of the Wisconsin Supreme Court; or (b) any decision of a court of last resort in another state which Wisconsin should follow under the statutory rule of uniformity.

(a) Respondent concedes that the Supreme Court of Wisconsin has adopted the general rule that the burden of proof of compliance with the Statute of Frauds rests upon the party claiming validity of the contract. *Padgham* v. *Wilson Music Company*, 3 Wisconsin 2nd. 363, 88 N.W. 2d. 679. However, the Wisconsin Court has never considered nor passed upon the unique question presented in this case, which is:

> "Should the seller of a machine which it had contracted to design and manufacture but which it had never built because of its alleged inability to design a practical machine, be charged with the burden of proving that the machine, if it had been built, would have been suitable for sale to others in the ordinary course of seller's business."

when the seller pleads the Statute of Frauds as a defense in a suit for damages for its breach of contract.

The Court of Appeals said:

> "We are unaware of any Wisconsin case which has passed upon this question and, therefore, we must look to the underlying policies involved and the law in other jurisdictions in an attempt to determine how Wisconsin courts would decide this issue."

The Court of Appeals is clearly right in its statement that no Wisconsin case has passed upon the question here involved; in fact no Wisconsin case cited by petitioner either here or in the courts below, has even involved application of the exception to the Statute of Frauds relating to specially manufactured goods. And no Wisconsin decision has ever considered the question of burden of proof of facts necessary to bring a case within the terms of the exception. Under these circumstances, there is nothing in the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64 which should prevent the Federal Court from considering "the underlying policies involved and the law in other

jurisdictions in an attempt to determine how Wisconsin Courts would decide this issue."

The alternative advocated by the petitioner, when reduced to its ultimate terms, simply means that the doctrine of *Erie* v. *Tompkins* must be so broadly applied by the Federal Courts that they are rendered powerless to initiate an exception to the general rule of burden of proof in any case, no matter how imperative the demands of reason and justice may be that an exception be made under the special circumstances of a particular case. To put it in another way, if petitioner's argument is sound, the Federal Courts can never develop any exception to a general rule of evidence until after the State Court has itself considered and approved the particular exception,—regardless of how convincing the reasons for making the exception might be.

Respondent submits this would expand the doctrine of *Erie* v. *Tompkins* far beyond its original intent which was to prevent conflicts in matters of substantive law between the holdings of the state and Federal Courts in the respective states. It was never intended to circumscribe the Federal Court's initiative in developing and applying sound principles of jurisprudence in cases which lead up paths which the State Courts have not yet travelled. In some cases the line of demarcation between conflict and consistency may be difficult to define, but in this case, where the Wisconsin Supreme Court has never even had before it a case involving the sufficiency of evidence as to facts necessary to bring a case within the terms of the exception, we submit that the question is not even close.

Since there was no Wisconsin precedent which should be followed, the Court of Appeals was entirely correct in its determination that it became its duty to consider

"underlying policies involved" and also "the law in other jurisdictions" to determine how the Wisconsin Court would decide the issue.

Any consideration of the underlying policies involved will surely result in the same conclusion reached by the Court of Appeals.

Cases involving application of this exception to the Statute of Frauds seem almost invariably to arise in situations where the facts are the *reverse* of those in this case, i.e., a seller-manufacturer is seeking to enforce, not to invalidate a contract for specially manufactured goods against the resistance of an unwilling buyer who invokes the statute as a defense to his obligation to accept and pay for them. In all these cases it was the manufacturer who asserted the validity of the contract; and under the general rule as to burden of proof, it has been held to be encumbent on the manufacturer who, as it happened, was the party claiming a valid contract, to establish affirmatively that the goods were not salable to others in the ordinary course of the manufacturer's business.

Respondent suggests that the underlying reasons for this rule, and the equitable considerations which initially brought about its common law application by the courts and its subsequent incorporation into the statutes were based upon the prevention of injustice to a seller who had specially manufactured goods for a buyer and who was not able because of a special characteristic to resell them to another or to resell them only at a great loss.

> "Why should the Sales Act be so worded as to exclude contracts for the sale of goods that 'are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business?' And why was Section 17 of the original Statute interpreted by most courts so as to exclude such contracts, even

though that Section contained no similar words? Is not the danger of fraud and perjury as great in these cases as in other cases? Possibly not; who can tell! It is very likely, however, that the exclusion of such contracts rests, not upon comparative statistics as to fraud and perjury or upon inchoate notions with respect thereto, but rather upon the fact that the strict application of the Statute in such cases would result in greater injustice to honest dealers than in other sales transactions. The American Courts and the draftsmen of the Sales Act gave weight to this consideration, although the English Courts had not done so. They have modified the law to avoid obvious injustice in hard cases. The English Courts leave the dentist, who made a set of false teeth to fit his patient, and the tailor, who makes a suit to special measure, to make the most they can of misfit teeth and suits, disregarding the fact that their materials and time and skill are now largely wasted. To avoid such loss, the American rule and the Sales Act make the oral contract enforceable, disregarding the supposed danger of fraud and perjury. In cases where the goods are to be manufactured specially for the buyer and are suitable for sale to others, the waste and loss caused by repudiation are not so great; the injustice from non enforcement is not so shocking. * * *" Corbin on Contracts, Vol. 2, Section 477.

In view of this history of the development of the rule and of the reasons for its existence, it seems clear that the underlying reason for the exception in case of special manufacturers ought not to have any application in this case, since exactly the reverse is true here. Hudson-Sharp is not here using the exception as a shield against injustice to one who has actually made a special machine in order to protect itself against a loss caused by lack of a resale market; but on the contrary, is attempting to make use of one of its conditions in order to escape its obligation to even make the machine. The burden of proof rule should

be applied to protect against an injustice—not to perpetrate one.

The other underlying policy factors considered by the Court of Appeals in reaching its determination that the rule of fairness required the assignment of the burden of proof to the petitioner are fully set forth in its opinion (pages 22-25 of the petition) and need not be repeated here.

Respondent therefore submits that a consideration of "the underlying policies involved" clearly justified the Court of Appeals in its determination that the burden of proof should rest upon petitioner under the particular circumstances of this case.

(b) Petitioner also contends that the Court of Appeals erred in failing to import certain New York decisions into Wisconsin law under the uniformity of interpretation provisions of the Wisconsin Statutes applicable to the Uniform Sales Act.

The petitioner broadly claims that the New York Court of Appeals, as well as the intermediate appellate Supreme Court of New York have held in several cases that the burden of proof is on the buyer of specially manufactured goods to establish that the goods are not suitable for sale to others in the ordinary course of the seller's business, in order to bring his case within the exception.

If the New York Court of Appeals had actually considered and decided this question as petitioner contends it did, we would have to agree that a strong argument for similar interpretation by the Wisconsin Courts would then exist because of the desirability of uniform interpretation of the Uniform Sales Act by the several states in which it has been enacted.

The case of *Berman Stores Company, Inc.* v. *Hirsh*, 148 N. E. 212, decided by the New York Court of Appeals in 1925 is the only decision of the highest appellate court of

New York which petitioner cites in support of its contention. It may be worth noting that respondent Erving Paper Mills actually cited and quoted from this same case in the Court of Appeals in support of its contention that the question of burden of proof was an open one. The partly deleted excerpt from the decision of the New York Court which appears on page 12 of the petition herein does not, we believe, fairly present that Court's consideration of the point with which we are concerned. We therefore quote it here, without deletion, as we did in the Court of Appeals:

> "In the present case, though undoubtedly the goods were to be manufactured by the seller especially for the buyer, the evidence does not establish that after manufacture they would not be suitable for sale in the ordinary course of the seller's business. The seller's business is to manufacture and sell goods of similar character. The evidence that the defendants had in their place of business models for the suits ordered, samples and even pieces of the materials from which they were to be made, and that they were described by the defendant's lot numbers, letters and figures, *lead to the inference that in the ordinary course of the defendant's business, such goods were ordered to be manufactured and bought by the defendant's customers. The evidence further establishes that they had a market value.* Under the circumstances *there was no ground for any inference* that the defendant's customers, who in the regular course of defendant's business bought such goods when manufactured upon their order, would not likewise buy them if already manufactured at the time the order was given. *The somewhat unsatisfactory evidence that the defendants agreed to place upon the goods plaintiff's labels and lot numbers is insufficient to show that the goods could not be sold to others.* For these reasons, the plaintiff has failed to show that the alleged contract comes within the exception of the Statute of Frauds." (Emphasis ours.)

This language seems reasonably to mean only that the evidence before the trial court at the close of plaintiff's case established that the goods were suitable for sale to others in the ordinary course of seller's business. It does not say nor necessarily imply that the burden of proof was on the buyer. The question of burden of proof was never considered, determined, nor even mentioned by the court anywhere in its opinion,

The other three New York cases cited by the petitioner are decisions of the New York Supreme Court, an intermediate appellate tribunal. Even if they sustained petitioner's contention, absent affirmance by the highest Appellate Court of the State, they would not be in any sense binding on the Wisconsin Supreme Court under the principle of uniformity. Beyond that, however, we respectfully submit that upon study of the opinions in these cases, it will appear, here too, that the question of burden of proof was not raised, considered, decided, or even mentioned in any of the cases. The most that can be fairly claimed for any of these cases is that the Court concluded that the evidence which was produced did not establish non-suitability for sale to others.

Such determination does not imply that the burden of proof was on either the buyer or the seller. The same determination was entirely permissible and logical, regardless of who had the burden of proof. It is only in the close case that the question of burden of proof becomes important, and in the cases cited by petitioner, the New York Courts obviously felt that the preponderance of the evidence was so great that the same result would be arrived at, regardless of which party had the burden of proof.

Respondent therefore submits that there was no precedent, in Wisconsin or New York, which the Court of Appeals was bound to follow with respect to burden of proof,

and that its determination that the burden should be on the petitioner under the unique circumstances of this case was eminently just.

II.

REPLY TO PETITIONER'S SECOND POINT.

Petitioner's second point is that it has been denied due process because the Court of Appeals, so petitioner claims, unexpectedly placed upon it the burden of proving the "unsalability" (sic) of the machines, rather than their "suitability for sale". It is clear that this contention is really nothing more than a semantic quibble. It is crystal clear from the Court of Appeals' opinion that it considered the terms "salability" and "suitability for sale" to be synonymous, and used them indiscriminately and interchangeably in that sense.

Petitioner implies that had it known that it was to be charged with proving "salability" of the machines, rather than "suitability for sale" it might have called as witnesses at the trial customers who would testify "they would have purchased the Campbell Wrappers as ordered by the defendant-buyer" (sic). (Petition page 14.).

Petitioner of course knew before the trial that suitability for sale to others in the ordinary course of its business would be an issue in the case, because petitioner itself created the issue when it amended its answer, with respondent's consent, to plead the Statute of Frauds as a defense.

It is hard to believe that able and eminent counsel for petitioner failed to call its customers as witnesses to their willingness to buy these unbuilt machines because of any belief that the burden of establishing suitability for sale to others was on the respondent. The advisability and desirability of producing such evidence did not depend on which party had the burden of proof. Obviously, petitioner

could not anticipate all of the evidence bearing on this issue which respondent might produce upon the trial. Whether or not respondent's evidence would be sufficient to sustain the burden, would certainly have to be weighed against the contra evidence produced by petitioner, so there was just as much reason for petitioner to put its best foot forward, so to speak, no matter where the burden lay. Under such circumstances it seems quite inconceivable, if such evidence was available, that petitioner failed to produce it merely because counsel may have thought the burden of proof was on the other side.

III.

OTHER REASONS WHY PETITION SHOULD BE DENIED.

1. It is obvious from the unique character of the factual situation (manufacturer-seller invoking "suitability for sale to others" as *defense* against obligation to build), that this case does not involve a point of major importance or general interest in the administration of justice, and is therefore not of sufficient consequence to command the attention of this court.

2. If the Court of Appeals has erred in its holding as to burden of proof, its judgment of reversal should nevertheless be sustained for the following reasons:

(a) If respondent did have the burden of proof, a fair evaluation of the evidence in the record shows that it sustained that burden. It is apparent from the learned District Judge's opinion that he regarded this as a very close question under the evidence as he reviewed it in his decision (R. 37-40). We suggest that the opinion shows that the learned trial court did not give sufficient consideration and weight to the evidence as to the extent of the changes which would have to be made in these machines before they would be suitable for sale to other paper manufactur-

ers. The order, Exhibit 11, required that these machines package a particular type and size of paper napkins of the precise dimensions of 13¼ inches when quarter-folded. The machine was to be designed to process napkins of the specific thickness, type of embossing and weight produced by Erving. This is shown conclusively by defendant's request in its letter of December 14, 1956 (Exhibit 9) requesting accurate information as to the bulk dimensions and embossing patterns of the napkins as they came from the folding machine. The testimony of defendant's vice president and sales manager, Cletus Wetli, as to the extent of adaptation of the standard or basic Campbell Wrapper which would be necessary to adapt it to plaintiff's paper napkins is also entitled to great weight on this point. Wetli testified (Trans. 286-289) "Q. Did Erving want a standard 2 W10 Wrapper? A. I can answer that, only I have to explain to you what is standard. 2 W6, 2 W8, 2 W10 refer to the size, to the width of the machine and about 75% of the working of that machine is standard. *The other 25%, it varies anywhere from 50% down to 10% would be changed to satisfy the particular product we are going to wrap.*" (Emphasis ours.)

All of the testimony is undisputed and we submit that it brings this case well within the rule of cases such as *Ericsson Manufacturing Co.* v. *Caille Brothers Co.* (Mich.), 162 N. W. 81, where the machinery contracted for, while it was of a general character coming within the seller's line of manufacture, was not in its details of the kind which it regularly made up and usually held for sale in the ordinary course of its business, but instead was specially made for and according to the specifications of the buyer.

Likewise in *Murphy* v. *Munson* (Calif.), 212 Pac. 2d 603 the court recognized that evidence of alterations and changes made in a standard type of machine at the buyer's request rendered it unsalable to others in the ordinary

course of the seller's business within the meaning of the Statute of Frauds.

The order for these machines (Exhibit 11) also required the machines to be equipped with infeed and delivery conveyors so as to integrate them with Erving's folding machines. This equipment would almost certainly have to be changed to integrate the machines with the locational requirements of other purchasers.

The only contrary testimony which the learned trial court referred to (R. 39) is one question and a self serving answer by the witness Olsen, Hudson-Sharp's General Manager, and one statement by Wetli in a memorandum to Olsen. A reference to this specific testimony will show that the witnesses were both referring *in general terms to the salability of a basic type of machine which would wrap paper products in polyethylene*, and not to the *specific machines which Hudson-Sharp was to produce for Erving for use only on Erving's particular type of paper napkin.*

(b) The memorandum was sufficient under the Statute of Frauds.

The Court of Appeals said in its opinion:

> "It necessarily follows that we do not reach the question of whether the writing between the parties constituted a memorandum of the contract sufficient to satisfy the Statute of Frauds."

In his original decision the learned District Judge held the memorandum insufficient *only* because it failed to state one essential term orally agreed upon between the parties, *i.e.*, the type of end seal which the machine was to produce on the finished package.

On Erving's motion for a new trial and other relief, the District Court's attention was called to undisputed testimony which the court had overlooked, establishing exactly the opposite. In deciding this motion, the learned District

Judge, on the basis of this undisputed evidence, vacated his original finding upon which alone he had based his decision that the memorandum was insufficient. However, he made a new and additional finding that: "The words 'efficiently polyethylene wrap' as used in the memorandum are too uncertain." On the basis of this additional finding the District Court denied Erving's motion to vacate the judgment against it.

It is not respondent's intention in this reply to a petition for certiorari to do much more than call this court's attention to the fact that if the memorandum were to be held by this court on appeal to be sufficient, the result reached by the Court of Appeals then would necessarily remain unchanged. Although the scope of Supreme Court Rule 24 seems broad enough, we have some doubts as to the relevancy of this point on a petition for certiorari, or the extent to which this court will care to go into the merits of this point, since the court may at this time very well wish to limit its consideration to the precise grounds upon which the Court of Appeals' decision rests in determining whether the petition should be granted. We therefore limit and conclude our reference to the sufficiency of the memorandum with a quotation, which, if the court does wish to consider the evidence in the record bearing upon this point at this time, may well prove helpful.

> "PURPOSE OF THE STATUTE OF FRAUDS. * * * What is that purpose? It is the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made. It is not to prevent performance or the enforcement of all contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators. Therefore, we should always be satisfied with 'some note or memorandum' that is adequate, when considered with the admitted facts, the surrounding circumstances, and all the explanatory and corroborative and rebutting evidence, to convince the

court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the Statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail." Corbin on Contracts, Vol. 2, Section 498.

Respectfully submitted,

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Dated October 12, 1964.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 532

HUDSON-SHARP MACHINE CO.,
a Wisconsin corporation,
Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
a Massachusetts corporation,
Plaintiff-Respondent.

REPLY BRIEF OF DEFENDANT-PETITIONER, HUDSON-SHARP MACHINE CO.

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HAMMERSMITH-KORTHEUER CO. MILWAUKEE

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REPLY BRIEF OF DEFENDANT-PETITIONER, HUDSON-SHARP MACHINE CO.

Respondent's brief in two respects gives an impression, albeit inadvertent, which is inaccurate and misleading.

I.

The respondent gives the impression that there are no cases in which the Statute of Frauds portion of the Uniform Sales Act, here involved, has been raised by a seller as a defense and the burden of proof held to be on the buyer, as plaintiff. The portion of the Uniform Sales

Act here involved is, in Wisconsin, Section 121.04(2), Wisconsin Statutes, and, in New York, Consol. Laws, c.41, as amended by Laws 1911, c. 571, §85, sub. 2.

The two cases quoted from in petitioner's brief are such cases, to wit: (1) *Zimmerman v. Gillman* (1918), 172 N.Y.S. 263, construing said portion of the Uniform Sales Act adopted by the State of New York, to wit: Consol. Laws, c. 41, as amended by Laws 1911, c. 571, §85, sub. 2, set forth in said *Zimmerman* case, and (2) *Berman Stores v. Hirsh* (1925), 148 N.E. 212, 240 N.Y. 209, the court of last resort in New York. Respondent's brief quotes at length from this latter case but does not acknowledge that the action was dismissed *at the close of plaintiff's case* because *plaintiff the buyer,* in the same legal situation as was respondent Erving Paper Mills in this case, "failed to show that the alleged contract comes within the exception of the Statute of Frauds."

II.

As to the difference in proof in determining whether "goods are not suitable for sale to others" or whether the goods are "unsalable," defendant petitioner's witness specifically testified at the trial as follows (Tr. p. 96):

> "If Hudson Sharp at the time it received Erving's purchase order in 1956 had a machine which would tightly wrap paper napkins in polyethylene, Hudson Sharp would have found these machines suitable for sale to others in the ordinary course of its business."

The witness, defendant-petitioner's general manager, was competent to testify as to the suitability of said machines for sale even though plaintiff-respondent might question its weight because of his interest. This testimony by a competent witness as to "suitability for sale"

of the machines, though uncontroverted, was held by the Court of Appeals not adequate to establish the "salability" of the machines. This test was not prescribed by the Sales Act but was adopted by the Court of Appeals. Apparently only testimony of customers willing to purchase such goods would meet the "rule of fairness" first enunciated by the Court of Appeals in this case.

The issue here does not involve the capacity of counsel to foresee what evidence is required for a specified question. The issue is whether the Court of Appeals has the jurisdiction, in view of the rule of *Erie v. Tompkins*, 304 U.S. 64, to ignore state law as to the construction of a uniform statute and enunciate a new rule of law for a "diversity" case, yet decline, when requested so to do, to give the defendant an opportunity to meet the newly-imposed burden under the newly-established rule.

Respectfully submitted,

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Dated: October 30, 1964